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IN THE

Supreme Court of the United States

October Term, 1967

No. 549

HERMAN SIEGELSON,
Petitioner,

against

STATE OF NEW YORK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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No.

HERMAN SIEGELSON,

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against

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PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

HERMAN SIEGELSON, the defendant-appellant below, prays that a Writ of Certiorari issue to review the affirmance of the judgment of the New York Court of Appeals entered in the above entitled case, on May 16, 1967.

Citations to Case Below

There were no opinions in the Courts below. The case is reported in 26 A.D.2d 619, 271 N.Y.S.2d 170, and affirmed in 19 N.Y.2d 889, 281 N.Y.S.2d 84. Reargument was denied in — N.Y.2d —, — N.Y.S.2d —, on June 1, 1967.

Jurisdiction

The judgment of the New York Court of Appeals was entered on May 16, 1967. Reargument was denied on June 1, 1967. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3). The federal questions herein

presented were raised in the normal appellate process and were the only questions argued and briefed in the New York Court of Appeals. The New York Court of Appeals remittitur reads as follows:

> "Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Defendant contended that he was denied due process of law under the Fourteenth Amendment to the United States Constitution, and also, that he was denied assistance of counsel under the Sixth Amendment to the United States Constitution. The Court of Appeals held that there was no denial of any constitutional right of the defendant."

Questions Presented

1. Whether petitioner's constitutional rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution were violated under circumstances wherein an ex parte conference was held between the District Attorney and sentencing Justice, concerning the sentence to be imposed upon petitioner, without notice to petitioner or his counsel, during which conference the District Attorney vehemently advocated, at great lenth, the merits of his position that petitioner should be incarcerated?

2. Whether this ex parte conference at which a commitment to incarcerate petitioner was agreed upon between the District Attorney and the sentencing Justice, and which was held immediately prior to the actual imposition of sentence in Court, was a critical stage in the proceedings that required notice to petitioner and his counsel, so as to assure that the subsequent sentence proceeding was not a mere formality, and, in effect, only the pronouncement of the sentence already agreed to by the District Attorney and sentencing Justice?

3. Whether our adversary system permits, after guilt is determined, ex parte access to the sentencing Justice, by the District Attorney, on the critically important question of an accused's liberty or imprisonment?

4. Whether our adversary system contemplates, on the question of punishment, the same privileged status to be accorded a District Attorney as in the case of a probation officer?

5. Whether our adversary system condones the pressure brought to bear upon a sentencing Justice by the advocacy of a District Attorney vehemently arguing, ex parte, the merits of his position that petitioner be incarcerated.

Constitutional Amendments Involved

The applicable provisions in pertinent part, of the Fifth, Sixth and Fourteenth Amendments are as follows:

Amendment V

"No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *."

Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, * * *; to be confronted with the witnesses against him; * * * and to have the Assistance of Counsel for his defense."

Amendment XIV

"Section 1. * * *; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement

The petitioner, a jewelry merchant for over 20 years, was the first person prosecuted under a newly created statutory misdemeanor crime [Section 452, Penal Law of New York, Added L. 1962, C. 872, eff. Sept. 1, 1962]. This section makes it a misdemeanor to sell an artifically colored diamond [*i.e.*, a genuine diamond enhanced as to color by an artificial process] *without a writing,* informing the purchaser of such fact. Petitioner pleaded guilty to its violation.

After making full restitution and cooperating with the District Attorney's office, the petitioner appeared for sentence. Immediately prior to the imposition of petitioner's sentence in open Court, there took place an ex parte conference in the sentencing Justice's chambers, between the prosecutor and sentencing Justice, which concededly concerned the sentence to be imposed upon petitioner. At this conference, which took place in the absence of notice to the accused and his counsel, the District Attorney vehemently advocated, at great length, the merits of his position that petitioner be incarcerated. After a lengthy and provocative appeal to the sentencing Justice, totalling forty-five minutes of unchallenged advocacy, the sentencing Justice was pressured into a commitment to incarcerate the petitioner. As a result, the actual sentence proceeding took place during the ex parte conference, and the proceeding in Court, which followed immediately thereafter, was, in effect, a mere formality involving the pronouncement of sentence already decided upon in chambers between the District Attorney and sentencing Justice.

At no time has respondent ever challenged the correctness of petitioner's allegation that the prosecutor, without notice to the petitioner and his counsel, and in their absence, pressured the sentencing Justice to incarcerate the

petitioner herein. In this connection the sentencing Justice stated at page 22 of the record:

> "And I strangled myself in this case; and I had the District Attorney in, and I argued with him for forty-five minutes."

Thus, the vehement and lengthy ex parte advocacy of the prosecutor-adversary, tainted and compromised the essential basis for a fair sentence proceeding, at a critical stage, and resulted in the sentencing Justice's loss of judicial objectivity. Because of the foregoing, the relief sought below was a vacatur of petitioner's sentence of 60 days in the Penitentiary, and a resentence before a different justice who would then hear both adversaries at the same time and in the same proceeding.

The Appellate Division of the Supreme Court of the State of New York, First Department, unanimously affirmed the judgment of conviction, without opinion. The New York Court of Appeals unanimously affirmed the judgment of conviction, without opinion.

Reasons for Granting the Writ

1. The decision below permits the continuation of a generally surreptitious and privileged practice, of ex parte access to the judge, by the prosecutor, concerning the merits of the latter's position. These ex parte conferences, on the question of punishment, are engaged in by the prosecutor and judge and are held without notice to the accused or his counsel. This, consequently, deprives an accused of his right to the assistance of counsel and his right to be meaningfully heard during the ex parte conference, at a time when the critically important issue of his liberty or imprisonment is decided.

Although there is no decision in New York regarding an accused's right to the assistance of counsel during an

ex parte conference between the prosecutor and sentencing Justice, other State Courts have vacated sentences under similar circumstances. (*State* v. *Harvey* [So. Car.], 123 S.E. 201, 128, S.C. 447; *Phelps* v. *State* [Texas], 158 Tex. Cr. 510, 257 S.W.2d 302). In both *Phelps* and *Harvey*, the Appellate Courts set aside the sentences on the ground that in each instance the County Attorney and/or the County Solicitor discussed the question of punishment with the Judge who was to impose sentence in the absence of the accused and their counsel.

2. Since the right to effective assistance of counsel, to confrontation and to due process of law are made applicable to the States via the Fourteenth Amendment to the United States Constitution, then ex parte access to the sentencing Justice, by the prosecutor on the question of sentence, derogates from the accused's right to a fundamentally fair sentence proceeding. (*Gideon* v. *Wainwright*, 372 U.S. 335, 83 S.Ct. 792; *Massiah* v. *United States*, 377 U.S. 201, 84 S.Ct. 1199; *Escobedo* v. *State of Illinois*, 378 U.S. 478, 84 S.Ct. 1758; *Miranda* v. *State of Arizona*, 384 U.S. 436, 86 S.Ct. 1602; *Pointer* v. *State of Texas*, 380 U.S. 400, 85 S.Ct. 1065; *United States* v. *Wade*, 386 U.S., — 87 S.Ct. 1926, 1932; *Gilbert* v. *State of California*, 386 U.S. —, 87 S.Ct. 1951; *Stovall* v. *Denno*, 386 U.S. —, 87 S.Ct. 1867). In *United States* v. *Wade, supra*, the Supreme Court held that an accused was entitled to the assistance of counsel at all critical stages of the criminal proceeding, "formal or informal, in Court or out, * * *." [Id. p. 1932]. The Supreme Court further stated that:

> "The presence of counsel at such critical confrontations [line-up], as at the trial itself, operates to assure that the accused's interests will be protected consistently with our *adversary theory of criminal prosecution.*" (emphasis supplied, id. p. 1932)

Unless the adversary theory of criminal prosecution terminates upon verdict, or plea of guilty, an accused is as much entitled to the assistance of counsel at the time his liberty and/or imprisonment is decided, as the "guiding hand of counsel" is needed to assure an accused due process of law in the determination of his innocence or guilt. There is no logical difference in criticalness in proceedings leading to a determination of guilt or innocence, and proceedings following such determination relative to the question of an accused's liberty or imprisonment. (*United Tribote*, 297 Fed. 2d 598, 601; *Gadsden* v. *United States*, 223 F. 2d 627, 630, 631.) In *Tribote, supra,* the United States Court of Appeals [2d Circ.] recognized that the regularity and fundamental fairness of the sentence proceeding is of particular significance in a case predicated upon a plea of guilty. At page 601 the United States Court of Appeals stated:

> "Indeed, in speaking of the importance of representation of counsel at this stage of the proceedings, the Supreme Court has suggested that under circumstances akin to those presented here, i.e., where conviction is on a plea of guilty, the aid of counsel may be more necessary than it is at the arraignment: '* * * It is a commonplace that no more difficult task confronts judges than the determination of punishment not fixed by statute. Even the most self-assured judge may well want to bring to his aid every consideration that counsel for the accused can appropriately urge. Carter v. People of State of Illinois, 329 U.S. 173, 178, 67 S. Ct. 216, 220, 91 L. Ed. 172 (1946).'" [Id. pp. 601, 602.]

In *Gadsden* v. *United States, supra,* the United States Court of Appeals [Dist. of Col.] stated with regard to the right of assistance of counsel at the sentencing stage, as follows:

> "The right to effective assistance of counsel at the sentencing stage of the proceeding is guaranteed by the Constitution. 'There is then a real need for counsel. * * * Then is the opportunity afforded for presentation to the Court of facts in extenuation

of the offense, or in explanation of the defendant's conduct; to correct any errors or mistakes in reports of the defendants' past record; and, in short, to appeal to the equity of the Court * * *'" [Id. at p. 630.]

3. In the case at Bar the sentencing Justice was pressured, in chambers, by the prosecutor to commit himself to incarcerate petitioner prior to the actual imposition of sentence in open Court. The record reveals [R. 22] that the sentencing Justice was subjected to a lengthy and provocative appeal, by the prosecutor, which pressured the Justice to arrive at a commitment to incarcerate the petitioner. Under these circumstances there was a total loss of that *judicial objectivity* which is necessary to accord an accused a fundamentally fair sentence proceeding. As the Supreme Court stated in *Miranda, supra.*

> "Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on * * *." [Id. at pp. 448, 1614.]

The presumed prejudice which inheres in, and the aroused suspicions, which result from, an ex parte conference, because of its inconsistency with our adversary theory of criminal prosecution, was pointed out in *Gadsden, supra,* as follows:

> "'Time and again this Court has said that Justice must not only be done but must manifestly be seen to be done * * *.'" [Id. at p. 631.]

In the instant case the petitioner was deprived of his constitutional right to be present with counsel, to rebut, challenge, explain and/or contradict statements made by the prosecutor which were solely intended to influence the sentencing Justice in his determination of the sentence to be imposed.

4. The Supreme Court's decisions in *Williams* v. *New York,* 337 U.S. 241, 252 [ft. n. 18], 69 S.Ct. 1079, 1085;

Townsend v. *Burke*, 334 U.S. 736, 68 S.Ct. 1252 and *Specht* v *Patterson*, 386 U.S. —, 87 S.Ct. 1209 are not contra to the petitioner's position herein since the case at Bar involves an issue never specifically decided by this Court, viz., the constitutionality of an adversary's ex parte access to the sentencing Justice, without notice to the accused or his counsel, notwithstanding that the accused is subsequently heard in open Court.

The right to be meaningfully heard in open Court and to the effective assistance of counsel in open Court, depends in large measure upon what transpires in chambers. The argument advanced by respondent below is that the prosecutor's ex parte conference with the sentencing Justice must be likened to the privileged status of a probation officer and/or hearsay statements contained in a probation report. There is no analogy. The distinction in purpose and objective between a probation officer vis-a-vis a prosecutor is apparent. A probation officer is a neutral and detached functionary, specially trained to aid offenders, who operates in a distinctly non-adversary capacity. Whereas the District Attorney's capacity, although concerned officially, in seeing justice done, is as an adversary whose perspective is perforce, prosecutorial and not rehabilitative or judicial. Therefore, the State's attorney's partiality to his position is not only understandable, but expected and consistent with our "adversary theory of criminal prosecution". The Supreme Court's reasoning in *Williams* v. *State of New York, supra*, which was adhered to in *Specht* v. *Patterson, supra*, permitting the sentencing justice to receive probation reports, is certainly distinguishable from an adversary's unchallenged influence when advocating his cause in the absence of the accused and the accused's counsel. The distinction was succinctly stated in *Williams, supra*, at page 249:

> "Probation workers making reports of their investigations have not been trained to prosecute but to aid offenders."

Also pointed out, significantly, by the Supreme Court in *Williams*, was the following:

> "What we have said is not to be accepted as a holding that the sentencing procedure is immune from scrutiny under the due process clause. See Townsend v. Burke, 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1960". [Williams v. New York, ft. n. 18, at pp. 252, 1085.]

It is respectfully submitted that this Honorable Court must now determine an issue which transcends the instant case and affects the very integrity of our adversary system in criminal prosecutions, i.e., the influence and advantage of an adversary who is permitted ex parte access to the judge before whom the cause is pending.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

FRED QUELLER,
Counsel for Petitioner,
401 Broadway,
New York, N. Y. 10013.

ROBERT L. COHEN of New York City,
of Counsel.

August 25, 1967.

APPENDIX

New York Court of Appeals Judgment of Affirmance, No Opinion

BE IT REMEMBERED, That on the 21st day of March, in the year of our Lord one thousand nine hundred and sixty-seven, Herman Siegelson, the appellant in this cause, came here unto the Court of Appeals, by Fred Queller, his attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And The People &c., the respondent in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Robert Louis Cohen, of counsel for the appellant, and by Mr. Eric A. Seiff, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

New York Court of Appeals Remittitur

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the First day of June A. D. 1967.

Present:

HON. STANLEY H. FULD, Chief Judge, presiding.

Mo. No. 626

THE PEOPLE &c.,

Respondent,

vs.

HERMAN SIEGELSON,

Appellant.

A motion having heretofore been made herein upon the part of the appellant for reargument, for a stay, and/or to amend the remittitur in the above cause to this Court, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks reargument and a stay, be and the same hereby is denied, and it is

ORDERED, that the said motion, insofar as it seeks amendment of the remittitur, be and the same hereby is granted. The return of the remittitur is requested and, when returned, it will be amended by adding thereto the following:

New York Court of Appeals Remittitur

Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Defendant contended that he was denied due process of law under the Fourteenth Amendment to the United States Constitution, and also, that he was denied assistance of counsel under the Sixth Amendment to the United States Constitution. The Court of Appeals held that there was no denial of any constitutional right of the defendant.

And the Supreme Court of New York County hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

(A Copy)

George Kimball,
Deputy Clerk.

Appellate Division Order of Affirmance, No Opinion

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 23rd day of June, 1966.

Present:

Hon. Benjamin J. Rabin,
Justice Presiding,
" Harold A. Stevens,
" Samuel W. Eager,
" Aron Steuer,
" Louis J. Capozzoli,
Justices.

10389—10390

The People of the State of New York,
Plaintiff-Respondent,

against

Herman Siegelson,
Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County, rendered on the 6th day of December, 1965, convicting defendant of the crime of selling artificially colored diamonds, in violation of § 452 of the Penal Law, and said appeal having been argued by Mr. Fred Queller, of counsel for the appellant, and by Mr. Eric A. Seiff, of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

Enter

Frank H. Crabtree
Deputy-Clerk.